NO. 23-156

In The

Supreme Court of the United States

SPEECH FIRST, INC.,

Petitioner,

v.

TIMOTHY SANDS, Individually and in His Official Capacity as President of Virginia Polytechnic Institute and State University,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ALUMNI FREE SPEECH ALLIANCE, THE UNIVERSITY OF CALIFORNIA FREE SPEECH ALLIANCE, THE CORNELL FREE SPEECH ALLIANCE, DAVIDSONIANS FOR FREEDOM OF THOUGHT AND DISCOURSE, THE GENERALS REDOUBT, HARVARD ALUMNI FOR FREE SPEECH, THE JEFFERSON COUNCIL FOR THE UNIVERSITY OF VIRGINIA, THE MIT FREE SPEECH ALLIANCE, PRINCETONIANS FOR FREE SPEECH, AND THE UNC FREE SPEECH ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

Gary M. Lawkowski
Counsel of Record
Supreme Court Bar No. 315998
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue
Suite 608
Alexandria, VA 22314
glawkowski@dhillonlaw.com
(703) 574-1654

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

The Alumni Free Speech Alliance (AFSA) brings together alumni groups that focus on supporting free speech, academic freedom, and viewpoint diversity at their colleges and universities. Members of AFSA believe that free speech, academic freedom, and viewpoint diversity are essential to the advancement of knowledge and to the very concept of a university.

The University of California Free Speech Alliance is an organization of alumni, faculty, administrators, and students. Its mission is to carry on the University of California's proud tradition as the birthplace of the free speech movement by making speech and expression on campus as free and open as in everyday life.

The Cornell Free Speech Alliance is an independent organization dedicated to advocating free expression, viewpoint diversity, and academic freedom at Cornell University. To these ends, it seeks to organize Cornell alumni, faculty, students, and staff in support of free expression and viewpoint diversity on campus, promote the adoption of strong free speech principles, and protect due process at Cornell University.

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[1] Consistent with Rule 37.1, *amici* provided notice to counsel of record for all parties of their intention to file this brief at least 10 days prior to the deadline to file this brief. No counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici or their counsel contributed money intended to fund its preparation or submission.

Davidsonians for Freedom of Thought and Discourse ("DFTD) is an independent alumni organization that aims to help ensure a learning environment at Davidson College that is ideologically balanced and that promotes a lively and fearless freedom of debate and deliberation. DFTD is not endorsed by Davidson college.

The Generals Redoubt is a group of concerned alumni, students, and parents of Washington and Lee University that seeks to preserve the University's unique history, values, and traditions, including its commitment to a classical liberal arts education empowered by an unfettered embrace of free speech.

Harvard Alumni for Free Speech is a non-political, non-partisan, independent organization dedicated to preserving and promoting free expression, academic freedom, and viewpoint diversity throughout the Harvard-Radcliffe community.

The Jefferson Council for the University of Virginia is a Virginia nonstock, nonprofit corporation formed by University of Virginia alumni and stakeholders to preserve the legacy of its founder, Thomas Jefferson. As part of its mission, the Jefferson Council for the University of Virginia seeks to promote intellectual diversity and an academic environment based on open dialog throughout the University.

The MIT Free Speech Alliance ("MFSA") is a group of alumni, faculty, students, and friends of MIT who have come together to support free speech, open inquiry, and viewpoint diversity at MIT. While MFSA

has faculty members and students as supporters, it is an alumni-led nonprofit organization that is independent of the Massachusetts Institute of Technology.

Princetonians for Free Speech is a nonpartisan community of alumni that works closely with faculty and student groups at Princeton University to support principles of free speech, academic freedom, and viewpoint diversity.

The UNC Alumni Free Speech Alliance is an independent, non-partisan organization led by University of North Carolina alumni. Its mission is to support and defend free speech, academic freedom, and viewpoint diversity at the University of North Carolina-Chapel Hill.

The University of California Free Speech Alliance, the Cornell Free Speech Alliance, Davidsonians for Freedom of Thought and Discourse, the Generals Redoubt, Harvard Alumni for Free Speech, the Jefferson Council for the University of Virginia, the MIT Free Speech Alliance, Princetonians for Free Speech, and the UNC Alumni Free Speech Alliance are all members of the Alumni Free Speech Alliance.

INTRODUCTION

"[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). "Freedom such as these are protected not only against heavy-handed frontal

attack, but also from being stifled by more subtle governmental interference." *Id.* at 183 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)).

This case presents an example of "more subtle governmental interference." Rather than adopting explicitly punitive speech codes or conditioning participation in university life on acceptance of prevailing views, colleges such as Respondent created "bias response" systems. Bias response systems typically utilize automated, digital systems that collect information about students, including in many cases from anonymous sources; maintain records and files of information recorded about students that may become widely available to administrators and faculty; and have all the indicia of a university judicial body, including the ability to investigate transgressions, save one: they do not directly punish students. Instead, the teams administering bias response systems can, among other things, "determine if disciplinary action is appropriate," "designate an administrator for follow-up," and "implement appropriate restorative justice techniques or methods." *Bias-Related Incident Protocol: Reporting, Response, and Resources* at 7, Virginia Tech Division of Student Affairs (Feb. 2016), https://dos.vt.edu/content/dam/dos_vt_edu/assets/doc/bias_protocol_2_16.pdf. They can also "invite" students to "voluntary" meetings with administrators. *See Speech First, Inc. v. Sands*, Case No. 7:21-cv-00203, 2021 WL 4315459 at *10 (W.D. Va Sept. 22, 2021).

Respondent argues that the inability to punish students directly or compel students to attend meetings in response to a complaint submitted

through the bias response system is enough to pass constitutional muster, or at least enough to ensure that no one is really hurt by the existence of the bias response system. The Fourth and Seventh Circuits agree. *See Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023); *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020). The Fifth, Sixth, and Eleventh Circuits do not. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022). As highlighted in the Petition for Writ of Certiorari, this circuit split alone justifies the grant of certiorari to clarify the "'patchwork of First Amendment jurisprudence for schools across the country' on 'the vitally important issue of free speech.'" Petition for Writ of Certiorari at i, *Speech First, Inc. v. Sands*, Case No. 23-156 (Aug. 17, 2023) (quoting *Sands*, 60 F.4th at 219 (Wilkinson, J., dissenting)).

Beyond the need to resolve the circuit split and set one common standard for First Amendment rights across the country, this case presents an opportunity for this Court to address an issue of widespread national importance that has a concrete, ongoing impact on the exercise of core constitutional rights.

First, this case raises important, continuing issues. Many American colleges have adopted bias response systems and other similar vehicles over the past decade. There is no sign that the pressure that this trend places on the exercise of students' core First Amendment rights will diminish on its own at any time in the foreseeable future.

Second, this case touches on core areas of constitutional significance. Freedom of speech and association are two of the most basic and significant fundamental rights. The mere existence of bias response systems threatens both. This is particularly true where, as in many cases, reports may be made anonymously, and the party subject to a bias response accusation does not have an opportunity to confront his or her accuser or even understand the circumstances giving rise to the report. The mere existence of such bias response systems—including the databases that are created with them and the potential for misuse of the data gathered by administrators—makes students and faculty less likely to express views that they fear may be controversial. This has real consequences for the ability of universities, particularly public universities, to fulfill their pedagogical missions as "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Third, this case provides an opportunity to clarify that the chilling effect of enduring an administrative process overseen by administrators who can affect the lives of students and faculty is itself a cognizable legal harm. When it comes to bias response systems, it does not matter that the people administering such systems cannot directly sanction students; the process *is* the punishment. This is particularly true where, as in many cases, bias response systems create secret or semi-secret records that students reasonably fear could impact their ability to obtain letters of recommendation, get jobs or promotions at their university, or get them labeled as troublemakers.

SUMMARY OF THE ARGUMENT

Who has standing to challenge the propriety of bias response systems is of great national importance and merits a portion of the Court's limited time.

Over the past decade, bias response systems have been adopted by many (if not most) American universities. Students do not perceive these programs as paper tigers. They are regularly used and omnipresent, contributing to an atmosphere of suspicion and repression on campus.

The growth of bias response systems matters because they are aimed at and have the effect of tamping down constitutionally protected speech. Bias response systems (including Respondent's) are not limited to illegal speech or actionable harassment. By their own terms, they seek to shape campus discourse by eliminating "loose[ly]" and vaguely defined "bias." Indeed, Respondent's own policy seeks to "stop" behavior it deems "hurtful to members of the community" through "educational interventions," even where such behavior consists of constitutionally protected speech. *See Bias-Related Incident Protocol: Reporting, Response, and Resources* at 7, Virginia Tech Division of Student Affairs (Feb. 2016), https://dos.vt.edu/content/dam/dos_vt_edu/assets/doc/bias_protocol_2_16.pdf.

The result is that students and faculty self-censor, particularly students and faculty who perceive themselves to be outside of the predominant political orthodoxy on campus. Continued suppression of disfavored views and resultant self-censorship is an

ongoing concern that warrants judicial resolution sooner rather than later.

This case is also important because it provides an opportunity to reaffirm that, particularly where the First Amendment is implicated, the process is the punishment for purposes of constitutional standing. Even crediting the superficial claims that bias response systems do not directly punish protected speech, these systems still inflict legally cognizable harms. The mere fact of being subjected to official inquiry by university administrators and the consequences that can be brought to bear on the student because of expressing constitutionally protected views is enough harm to satisfy standing requirements. These concerns are exacerbated where, as in the case of Respondent, official inquiries may be initiated by anonymous complaints, which are ripe for abuse, and come with corresponding record-keeping practices, which effectively function as compelled disclosure of protected associations.

ARGUMENT

I. Bias Response Systems Are Widespread, Pervasive, and Active

The situation at Virginia Tech is not unique. Over the past decade, under a variety of names, bias response systems have exploded onto campuses across the country.

This is neither a passing fad nor an example of a single, outlier university. Thus, whether bias response systems chill constitutionally protected

speech is of significant national importance and justifies a claim on the Court's time.

A. Bias Response Systems Have Proliferated Across the Country Over the Past Decade

Press reports indicate that "over the past eight to 10 years," nearly 500 colleges and universities in the United States have introduced "bias reporting systems." Margaret Peppiatt, *Meet the Software Company Tracking College Students' Behavior*, The College Fix (Mar. 2, 2023), https://www.thecollegefix.com/meet-the-software-company-tracking-college-students-behavior/. To wit, of the 824 colleges and universities evaluated in Speech First's 2022 Report, 456 (56%) had bias reporting systems. *See REPORT: Free Speech in the Crosshairs: Bias Reporting on College Campuses*, Speech First (2022), https://speechfirst.org/report-free-speech-in-the-crosshairs-bias-reporting-on-college-campuses/. The 456 bias response systems identified by Speech First are *twice* as many as the 232 bias response systems identified by the Foundation for Individual Rights in Education just five years earlier. *See id.; see also First National Survey of 'Bias Response Teams' Reveals Growing Threat to Campus Free Speech*, Foundation for Individual Rights and Expression (Feb. 7, 2017), https://www.thefire.org/news/first-national-survey-bias-response-teams-reveals-growing-threat-campus-free-speech.

Moreover, there are circumstantial reports suggesting that even this explosive growth may be undercounting the true scope of bias reporting systems. One company, which boasts of having

contracts with 1,300 schools, has acknowledged helping schools implement software solutions to track "student conduct" incidents, including "bias incident reports." Douglas Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, Wall St. J. (Feb. 23, 2023), https://www.wsj.com/articles/stanford-faculty-moves-to-stop-students-from-reporting-bias-anonymously-cbac78ed?mod=Searchresults_pos1&page=1; *see also Some Numbers*, Maxient (accessed Sept. 8, 2023), https://www.maxient.com/.[2]

B. Students Actively Report Bias Incidents

These reporting systems are not fallow fields. "Bias incident reports" at Virginia Tech are increasing, rising from 29 complaints in Spring 2017 to 35 in Fall 2017, 37 in Spring 2018, and 52 in Fall 2018. *Speech First, Inc. v. Sands*, Case No. 7:21-cv-00203, 2021 WL 4315459, at *10 (W.D.Va. Sept. 22, 2021). The same trend is evident at Cornell University. In FY23, Cornell had 175 reported "bias" incidents, an increase of 23% over the 134 reported incidents in FY22. Cornell University, *FY23 Reporting Bias System Annual Report: Summary of Activity July 1, 2022 – June 30, 2023* at 5, https://acrobat.adobe.com/link/review?uri=urn%3Aaa

[2] A senior client support specialist with the same company stated, "[w]e usually help students implement the software to their intended uses when we begin working with them, so over the years we've certainly had some (indication) they'll be using it for 'bias incidents.'" Margaret Peppiatt, *Meet the Software Company Tracking College Students' Behavior*, The College Fix (Mar. 2, 2023), https://www.thecollegefix.com/meet-the-software-company-tracking-college-students-behavior/.

id%3Ascds%3AUS%3Ab4e83067-c251-3566-ad3f-ef1daec30dd7.

Virginia Tech and Cornell are not unique in having active bias reporting. For example:

- At Princeton University, there were 96 reports of bias incidents in the 2021-2022 academic year, 104 reports in 2020-2021, and 117 reports in 2019-2020. Matthew Wilson, *Princeton's 'Bias-Reporting' System Is Stifling Campus*, Nat'l Rev. (Mar. 11, 2023), https://www.nationalreview.com/2023/03/princetons-bias-reporting-system-is-stifling-campus/.

- The University of Texas's "Hate and Bias Incidents Policy has been resorted to countless times regarding hundreds of events since 2012." *Fenves*, 979 F.3d at 335.

- The University of California system, which includes ten campuses, "collected 457 acts of 'intolerance or hate' during the 2021–22 school year," of which "296 were defined as offensive speech." Douglas Belkin, *Stanford Faculty Say Anonymous Student Bias Reports Threaten Free Speech*, Wall St. J. (Feb. 23, 2023), https://www.wsj.com/articles/stanford-faculty-moves-to-stop-students-from-reporting-bias-anonymously-cbac78ed?mod=Searchresults_pos1&page=1.

Moreover, the same company that boasted of its involvement in creating bias reporting systems claims to receive 7,000 reports every day, though it does not

differentiate between bias reports and other student conduct reports. *Some Numbers*, Maxient (accessed Sept. 8, 2023), https://www.maxient.com/.

II. Bias Response Systems Are Explicitly Aimed at and Have the Effect of Reducing Expression of Unpopular Ideas

A chilling effect on protected expression is bad in any context, but it is particularly pernicious in the college or university setting. "The essentiality of freedom in the community of the American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957). This is in no small part because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate." *Shelton*, 364 U.S. at 487 (quoting *Sweezy*, 354 U.S. at 250).

Protection of free speech rights on college campuses serves the three-fold purpose of (1) encouraging critical thinking and academic freedom; (2) assisting students in the discovery and pursuit of truth; and (3) encouraging tolerance for viewpoints one finds repugnant. "Perhaps the most important reason given for the right to free speech is to encourage the discovery of truth." Craig B. Anderson, *Political Correctness on College Campuses: Freedom of Speech v. Doing the Politically Correct Thing*, 46 SMU L. Rev. 171, 177 (1992). "[S]ome commentators have

argued that the fundamental human dignity of each individual requires that the government not interfere with the right to freely express one's views and opinions." *Id.* at 178. "A final but very important justification for the right to free speech is that freedom of speech is crucial to engendering in our society a tolerance for diverse and conflicting viewpoints." *Id.*

The rise of bias response systems is not consequence-free and is not intended to be. Bias response systems are explicitly aimed at narrowing the range of acceptable expression. Their rise correlates with a marked chill of expressions of protected speech. In light of these consequences, the Court should address the legal issues surrounding bias response systems now.

A. Bias Response Systems Are Intended to Narrow the Range of Acceptable Views That Can Be Expressed

The intended purpose of bias response programs is to narrow the window of acceptable student speech.

In crafting bias policies, many universities intend the policies to apply to constitutionally protected speech. For example:

- "Virginia Tech believes that some complaints that do not violate the law or the Student Code of Conduct may nonetheless present an educational opportunity." *Sands*, 69 F.4th at 189;

- The University of Central Florida explicitly advises that "'[b]ias-related incidents occur

without regard to whether the act is legal, illegal, intentional, or unintentional,' and that such an incident need 'not necessarily rise to the level of a crime, violation of state law, university policy, or the student code of conduct.'" *Cartwright*, 32 F.4th at 1116; and

- The University of Texas states, "[i]ndividuals may report concerns such as a student organization hosting a party with a racist theme, derogatory graffiti regarding sexual orientation or gender identity and expression . . . or *concerns that someone has created a hostile or offensive classroom environment.*" *Fenves*, 979 F.3d at 325 (emphasis added).

As noted in several courts of appeals, these terms are often vague and highly subjective, leaving prospective speakers to wonder what conduct will fall within the reach of the bias response system.

As evidenced by the pejorative term "bias," these programs are not intended to be neutral mediators or facilitate an open marketplace of ideas. They are explicitly aimed at "eliminating" acts of "bias," whatever that happens to mean, even if doing so constricts constitutionally protected speech. Indeed, Virginia Tech's "[bias response system] was created to '*eliminate acts of bias*' through 'immediate direct or indirect responses to bias-related incidents.'" *Sands*, 69 F.4th at 206 (Wilkinson, J., dissenting) (emphasis added). Similarly, the University of Texas "Campus Climate Response Team" reflects a "commit[ment] to an academic and work environment free from acts of intolerance, hate, bias or prejudice"

while aiming to "minimize campus climate incidents." *Fenves*, 979 F.3d at 325.

Taken at face value and without regard to protecting constitutional rights, these goals could be laudable. After all, who doesn't want less "bias" or "offensive" conditions? But "[a]s Mr. Justice Black put it most simply and clearly: 'I do not believe that it can be too often repeated that the freedom of speech . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later [it] will be denied to the ideas we cherish.'" *Healy*, 408 U.S. at 188 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting)).

Particularly when combined with "loose and rambling" definitions that explicitly encompass lawful free expression, *Sands*, 69 F.4th at 207 (Wilkinson, J., dissenting), bias response systems are mechanisms for suppressing dissent. As Judge Wilkinson observed, "[w]hen the stated goal of the bias response team is to 'eliminate' bias, we are faced not with a gentle effort to convince students to be unbiased but with a systemic effort to coercively drive out views that strike administrators the wrong way." *Sands*, 69 F.4th at 207 (Wilkinson, J., dissenting).

The Court has long recognized, even (and perhaps especially) in schools, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "Mere unorthodoxy or dissent from the prevailing mores is

not to be condemned. The absence of such voices would be a symptom of a grave illness in our society." *Sweezy*, 354 U.S. at 251.

Bias response systems explicitly seek to slam the window shut on "unorthodoxy or dissent from the prevailing mores." As such, who has standing to challenge them and under what circumstances is of great and urgent importance.

B. Bias Response Systems Chill the Expression of Unpopular Views

In light of the clearly stated intent to stamp out unwanted speech, it is perhaps unsurprising that an upward trend of self-censorship by students mirrors the rise in bias response systems. "A recent poll found that more than 80 percent of students say they self-censor at least part of the time." Cherise Trump, *Restore Campus Free Speech by Eliminating Bias Reporting Systems,* American Enterprise Institute (July 19, 2022); https://www.aei.org/research-products/report/restore-campus-free-speech-by-eliminating-bias-reporting-systems/ (citing Foundation for Individual Rights and Expression and College Pulse, *2021 College Free Speech Rankings*, RealClearEducation, (Sept. 2021), https://www.realcleareducation.com/speech/). Indeed, "[s]ixty percent of students have at one point felt they couldn't express an opinion on campus because they feared how other students, professors or college administrators would respond . . . ." Greta Anderson, *A Perception Problem About Free Speech*, Inside Higher Ed (Sept. 28, 2020), https://www.insidehighered.com/news/2020/09/29/fire-report-students-are-censoring-their-opinions.

In more recent studies, "60 percent of college students expressed reluctance to discuss at least one controversial topic – with students most reluctant to discuss politics (39.5 percent), followed by religion (31.8 percent), and race (27.5 percent). Although a majority of surveyed students (88 percent) agreed that colleges should foster open and civil discourse, 63 percent stated that the climate on their campuses was not conducive to free expression." Shannon Watkins, *Did You Know? Results of New Campus Expression Survey*, The James G. Martin Center for Academic Renewal (Mar. 3, 2022), https://www.jamesgmartin.center/2022/03/did-you-know-results-of-new-campus-expression-survey/.

Moreover, self-censorship is not evenly distributed among the student body. A study at the University of North Carolina found "[c]ompared to self-identified liberals, self-identified conservative students express greater concern about potential academic consequences that might stem from expressing their views." Jennifer Larson, Mark McNeilly, Timothy J. Ryan, *Free Expression and Constructive Dialog at the University of North Carolina at Chapel Hill* at 1 (Mar. 2, 2020), https://fecdsurveyreport.web.unc.edu/wp-content/uploads/sites/22160/2020/02/UNC-Free-Expression-Report.pdf. Within that study, "12.5% of self-identified liberal students worried that expressing sincere views would cause an instructor to have a lower opinion of them, but 49.6% of self-identified conservative students felt this way. . . . Most alarmingly, the proportion of self-identified conservatives who censored themselves at least once (67.9%) is almost three times as large as the

proportion of self-identified liberals who did the same (24.1%)." *Id.* at 28.

Concerns about self-censorship are not limited to students. Faculty members have likewise fallen prey to the increasing pressure and growing threat of censorship by bias response policies. "[F]indings indicate that concerns over self-censorship in academia are not overblown." Foundation for Individual Rights and Expression, *The Academic Mind in 2022: What Faculty Think About Free Expression and Academic Freedom on Campus*, https://www.thefire.org/research-learn/academic-mind-2022-what-faculty-think-about-free-expression-and-academic-freedom. "At the end of the Second Red Scare in 1955, 9% of social scientists said they toned down their writing for fear of causing controversy. Today, one in four faculty say they're very or extremely likely to self-censor in academic publications, and over one in three do so during interviews or lectures." *REPORT: Faculty members are more likely to self-censor today than during McCarthy era*, Foundation for Individual Rights and Expression (Feb. 28, 2023), https://www.thefire.org/news/report-faculty-members-more-likely-self-censor-today-during-mccarthy-era. "The data show[s] that faculty members today are more fearful than during the Second Red Scare, with 72% of conservative faculty, 56% of moderate faculty, and even 40% of liberal faculty afraid of losing their jobs or reputations due to their speech." *Id.*

Bias response systems contribute to a stifling environment that has real-world consequences,

resulting in increasing self-censorship that is inimical to the basic mission of the American university.

III. The Chilling Effect of Enduring an Administrative Process for Engaging in Protected Activity Is a Cognizable Legal Harm

This case presents an opportunity for the Court to address a question that has gone unanswered since *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 166 (2014): Does the threat of administrative proceedings alone give rise to an Article III injury? In *Driehaus*, the Court explicitly reserved this question, stating, "[a]lthough the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury." *Id.*

The Court "[is] not free to disregard the practical realities." *Healy*, 408 U.S. at 183. "[T]he Constitution's protection is not limited to direct interference with fundamental rights . . . . 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Id.* (quoting *Bates*, 361 U.S. at 523). Bias response systems may be a more subtle form of governmental interference, but they are interference nevertheless, and that gives rise to a legally cognizable harm. The chilling effect is magnified when the process is undertaken against a college student by administrators and faculty who have (and are known to have) the ability to influence the student's education and future employment.

A. Official Inquiry into Protected Activity Alone Is Itself a Cognizable Harm

The Court has long recognized that compelled disclosure of political views and associations has a legally cognizable chilling effect, even if there is no direct consequence attached to the association itself. "[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Americans for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).

"Inviolability of privacy in group association may in many cases be indispensable to preservation of freedom of association, particularly where a group espouses dissident views." *NAACP*, 357 U.S. at 462. This is true even where the government does not directly sanction disfavored speech. *See NAACP*, 357 U.S. at 463 ("It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have on participation by [the State's] citizens in petitioner's activities follows not from state action but from private community pressures.").

On this score, Justice Douglas's warning in *United States v. Rumley* is particularly prescient. 345 U.S. 41, 57–8 (1953) (Douglas, J., concurring). *Rumley* addressed a book publisher refusing to answer questions from a Congressional committee concerning the names of people to whom he distributed books. As with bias response systems,

Congressional committees have no authority to punish the underlying conduct; they are just asking questions.

Yet, Justice Douglas warned, "[i]f the present inquiry were sanctioned the press would be subject to harassment that in practical effect might be as serious as censorship. . . . True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe." *Rumley*, 345 U.S. at 57 (Douglas, J., concurring). This is because the governmental inquiry creates "the spectre of a government agent [] look[ing] over the shoulder of everyone who reads," with which "[t]he subtle, imponderable pressures of the orthodox lay hold." *Rumley*, 345 U.S. at 57 (Douglas, J., concurring).

Even though Congress lacked authority to directly punish speakers it disliked, the punishing nature of the process itself created "the menace of the shadow government will cast over literature that does not follow the dominant party line . . . Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and the press." *Rumley*, 345 U.S. at 58 (Douglas, J., concurring). Since government could not do this "by law," for Justice Douglas "[t]he power of investigation is also limited" and "[i]nquiry into personal and private affairs is precluded." *Rumley*, 345 U.S. at 58 (Douglas, J., concurring); *see also Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) ("[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into

these protected areas . . . discourage citizens from exercising rights protected by the Constitution.").

The same is true for bias response systems. Universities cannot directly regulate the nearly limitless scope of expression that may run afoul of "loose and rambling" definitions that explicitly encompass lawful free expression. *Sands*, 69 F.4th at 207 (Wilkinson, J., dissenting). Their "broad and sweeping" inquiries into speech and association under the guise of bias response thus pose a serious risk of discouraging citizens from exercising protected rights, resulting in legally cognizable harm.

B. The Mere Accusation of "Bias" is Sufficient to Inflict Reputational Harm

The mere accusation of "bias" is enough to damage a student's reputation. As Judge Wilkinson noted, "it damages a student's reputation if her classmates know that she had to undergo an 'educational or restorative' intervention, implying that the student is either ignorant or in need of moral restoration." *Sands*, 69 F.4th at 212 (Wilkinson, J., dissenting).

Once the genie of reputational harm is out of the bottle, it is hard (if not impossible) to undo it. As former Labor Secretary Raymond Donovan famously asked, to no avail, "Which office do I go to get my reputation back?" Joseph P. Fried, *Raymond Donovan, 90, Dies; Labor Secretary Quit Under a Cloud*, N.Y. Times (June 5, 2021), https://www.nytimes.com/2021/06/05/us/raymond-j-donovan-dead.html.

C. The Risk of Reputational Harm is Exacerbated by Anonymous Complaints

The potential for reputational harm is further exacerbated by the fact that at many universities, including Virginia Tech, students are able to make claims anonymously. *See Sands*, 69 F.4th at 188. For standing purposes, the Court has noted "[t]he credibility of that threat [of enforcement] is bolstered by the fact that authority to file a complaint with the Commission is not limited to a prosecutor or agency. . . . Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Susan B. Anthony List*, 573 U.S. at 164. This risk is heightened when complainants not only are unbound by "explicit guidelines or ethical obligations," but do not even have to associate their names with their grievances.

Moreover, anonymous complaints are particularly pernicious in the university context. "Scholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy*, 354 U.S. at 1212. As Judge Wilkinson warned, "[w]here students are urged to report on one another, mutual suspicions fester, as any society bereft of basic freedoms can attest." *Sands*, 69 F.4th at 209 (Wilkinson, J., dissenting).

There is reason to believe fears of "mutual suspicions" festering and stifling free expression are well founded. As one study at the University of North Carolina at Chapel Hill noted, "there are signs that constraints on free expression derive at least as much from students' peers as from faculty." Jennifer

Larson, Mark McNeilly, Timothy J. Ryan, *Free Expression and Constructive Dialog at the University of North Carolina at Chapel Hill* at 31 (Mar. 2, 2020), https://fecdsurveyreport.web.unc.edu/wp-content/uploads/sites/22160/2020/02/UNC-Free-Expression-Report.pdf. That study also noted, "[a] remarkable number of students across the ideological spectrum indicated that they felt such worry [about expressing their sincere views] at least 'once or twice.'" *Id*. at 29.

Like self-censorship more generally, these concerns are not evenly distributed across the political spectrum: "[W]hereas 50.5% of self-identified liberal respondents have 'never' felt worried, only 9.9% of self-identified conservative respondents selected this option. The highest percentage of self-identified conservative respondents (32.5%), rather, reported feeling worried 'most weeks,' the most frequent option; 1.69% of self-identified liberal respondents selected this option." *Id*.

This strongly suggests that the prevailing culture, including anonymous reporting of protected speech one finds "offensive," is depriving the university community of a robust discussion around even mainstream political views.

D. The Creation and Maintenance of Official Records of Constitutionally Protected Activity has an Objectively Chilling Effect

As Judge Wilkinson astutely observed, "[t]here is no point in keeping something on file if it will never be used for anything." *Sands*, 69 F.4th at 212 (Wilkinson, J., dissenting). Students may reasonably

fear that bias response reports may have an adverse impact on all manner of future university activities, from obtaining letters of recommendation or jobs to increasing the risk and severity of collateral disciplinary proceedings.

These fears are well-founded. For example, Princeton University utilizes a third-party contractor to collect student reporting data who acknowledges "[s]tudent data collected . . . can be handed over to government authorities or private parties upon request" and "that 'nearly all requests for data' are related to" educational systems of records. Matthew Wilson, *Princeton's 'Bias-Reporting' System Is Stifling Campus*, Nat'l Rev. (Mar. 11, 2023), https://www.nationalreview.com/2023/03/princetons-bias-reporting-system-is-stifling-campus/. Princeton University also candidly acknowledges that "the university's DEI office retains all data collected from submitted reports in its permanent records in order to 'identify' future 'opportunities for training and community support,'" which has its own Orwellian overtones. *Id*.

Moreover, multiple sources provide anecdotal accounts of information in student conduct files having collateral consequences. For example, *National Review* reports that "[s]tudent-conduct officers can use the files, including complaints students do not even know about, as well as ones for which they are found not responsible, to establish patterns of behavior that can be used against them" in subsequent proceedings. Steven McGuire, *Stanford University's Pernicious Snitching Apparatus*, Nat'l Rev. (Feb. 24, 2023), https://www.nationalreview.com/2023/02/stanford-

universitys-pernicious-snitching-apparatus/.
National Review further reported, "[t]he information collected might also be reviewed when students apply for housing, resident-assistant positions, or other perks or jobs at their university" and quoted one Title IX attorney claiming to see this behavior "[a]ll the time," including observing it "go as far as the [Title IX] office forcing students to resign from jobs that are at employers not owned by but certainly doing business with the school." *Id*.

The allegations in these reports are concerning in and of themselves. But perhaps more importantly, it is not necessary to credit the specific factual claims therein to conclude that the collection of large amounts of data about constitutionally protected activity alone is enough to justify a reasonable fear of collateral consequences sufficient to establish standing. After all, to paraphrase Winston Churchill, standing "is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning" of the Court's inquiry.

CONCLUSION

This case presents important and urgent questions that should be addressed now. Bias response systems serve as de facto speech codes that permit administrators to chill free speech based on their own biases and subjective interpretations of what constitutes "bias." The Court should grant Petitioner's request for a writ of certiorari.

Respectfully submitted,

GARY M. LAWKOWSKI
Counsel of Record
Supreme Court Bar No. 315998
DHILLON LAW GROUP, INC.
2121 Eisenhower Avenue
Suite 608
Alexandria, VA 22314
GLawkowski@DhillonLaw.com
(703) 574-1654

Counsel for Amici Curiae the Alumni Free Speech Alliance, the University of California Free Speech Alliance, the Cornell Free Speech Alliance, Davidsonians for Freedom of Thought and Discourse, The Generals Redoubt, Harvard Alumni for Free Speech, The Jefferson Council for the University of Virginia, the MIT Free Speech Alliance, Princetonians for Free Speech, and the UNC Free Speech Alliance

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